

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

75-2143

To be argued by
RICHARD I. ROSENKRANZ

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 75-2143

JAIME AVILES,

Petitioner,

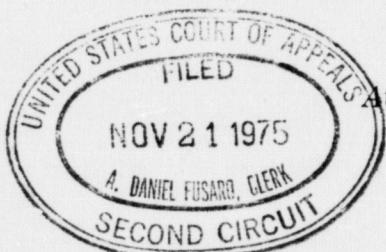
—v.—

B
P/S

UNITED STATES OF AMERICA,
Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON BEHALF OF PETITIONER JAIME AVILES



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UNITED STATES OF AMERICA,

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BRIEF ON BEHALF OF PETITIONER JAIME AVILES

Preliminary Statement

This is an appeal from an order of the United States District Court for the Southern District of New York filed on October 21, 1975 (Palmieri, D.J.) which denied petitioner's application pursuant to 28 U.S.C., Section 2255, to vacate a plea of guilty entered before Judge Palmieri on February 15, 1973, occasioned by the fact that the Court and counsel at the time of said pleading had failed to advise petitioner that his plea would subject him to a term of special parole in addition to a sentence of imprisonment.

HISTORY

On February 15, 1973, the petitioner plead guilty to a one count indictment charging him with a Seven Hundred (\$700) Dollar sale of heroin in violation of 21 U.S.C., Section 841(a)(1).

On March 29, 1973, the petitioner was sentenced to a term of Twelve (12) years imprisonment with an additional term of Six (6) years of special parole "as required by statute".

It is undisputed that the petitioner had not been advised that as a consequence of his plea he would be subjected to an additional term of six years of special parole by either the Court or his counsel.

By a petition verified the 5th day of June, 1975 counsel for petitioner moved, pursuant to 28 U.S.C., Section 2255, for the invalidation of petitioner's conviction because of the failure of both Court and counsel to advise petitioner that he would be subjected to a special parole (See, petition 28a-31a);* Judge Palmieri's order denying the petition then followed.

ARGUMENT

POINT I

The court below erred in not granting the relief sought by petitioner's 28 U.S.C., Section 2255 application.

As the Court below acknowledges in its opinion:

"The minutes of the plea proceedings here in issue disclose that the court *did not* inform Aviles of the requirement of special parole prior to the acceptance of his plea" (4a).

The Court then states that "there was no requirement at that time that such information be directly imparted

* Numerals followed by "a" denote references to petitioner's Appendix.

to him by the court". Of course, this is an inaccurate statement of law. It has always been the undelegable duty of the Court to "fully" inform an accused of the consequences of his plea. *Fed. R. Crim. R. 11, McCarthy v. United States*, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed. 2d 418 (1969); *Irizzly v. United States*, 508 F.2d 960 (2d Cir. 1974).

The Court below then points, in its opinion, to a lack of an affidavit from the petitioner and states that "he was unaware of the special parole sentence and that such unawareness would have changed his plea" (4a-5a).

If it were not for the petitioner, who deemed himself a party aggrieved, there would be no "*habeas*" proceeding in the first instance. It is not counsel who is imprisoned. Implicit, in moving for this relief is the petitioner's manifestation through counsel of being a party aggrieved by the Court's procedural omission of not apprizing him of a special parole. Indeed, the petitioner, *pro se*, had unsuccessfully sought to have his conviction vacated upon grounds unrelated to the issue at bar. The petitioner has been a party aggrieved from the very instant he was sentenced to a larger term than a similarly circumstanced defendant, one Alfredo Medina, and received the imposition of a period of special parole. At the very instant that a legal remedy appeared upon the horizon petitioner availed himself of such doctrine of law through his attorney. *Ferguson v. United States*, 513 F.2d 1011 (1975).

Apart from the foregoing, the approach which counsel has pursued in this case is in total conformity with this Court's holding in *Ferguson v. United States*, [513 F.2d at p. 1013(4)] where it is stated:

"The purpose of this requirement was to avoid the difficulties which attend fact-finding long after the sentencing colloquy, a policy we find equally applic-

able here. Accordingly, we hold that where the transcript or other record of the sentencing proceeding fails to disclose that the judge informed a defendant of the consequences of his plea, the defendant *must* be permitted to replead." *Ferguson v. United States, supra.*

Moreover, the Court below states, in its opinion, that counsel did not state in his affidavit that he did not inform *Aviles* of a special parole. It is clear from the transcript that counsel stated to the court that no mention of the conference special parole was made to *Aviles*.

It is difficult to understand the reasoning of the Court below in this regard since the minutes of the conference alluded to in the opinion of the Court below will conclusively demonstrate that counsel informed Judge Palmieri that he had not informed *Aviles* about a special parole. Counsel advised *Aviles* only of the maximum prison sentence and never advised him and neither did the Court that petitioner faced a term of special parole.

It seems that the criticism of the Court below concerning counsel stems from the fact that counsel has strictly adhered to the Court's clear teachings in the *Ferguson* case, *supra*, and did not seek to burden the Court with an evidentiary hearing which this Court deems undesirable.

The Court below makes much of the fact that *Aviles'* twelve (12) year prison sentence and six (6) years of special parole aggregate to less than the maximum term of imprisonment, i.e., twenty-five (25) years. Of course, this is of no moment.

The Court below seemingly overlooked the fact that the aggregate terms of imprisonment and special parole in the trilogy of cases cited by said Court—*Michel-Fer-*

guson-Brewington—parallels the case at bar in that the defendants there, as Aviles, received sentences less than the maximum term which could have been imposed. The Court's reasoning in this regard is unacceptable in view of the fact that it follows the erroneous premise that if a particular sentence is less than the possible maximum then vital procedural safeguards are meaningless.

The Court below curiously omits from its opinion the important fact that a defendant by the name of Alfredo Medina, arrested as an outgrowth of the investigation where petitioner and his brother, Jose Antonio Aviles * had been arrested also pleaded guilty and was sentenced by Judge Palmieri prior to petitioner. Alfredo Medina, like petitioner, is a multiple narcotics offender. Unlike petitioner, whose involvement did not exceed a Seven Hundred (\$700) Dollar sale of heroin and where the profit margin is minuscule, Medina was negotiating with the Undercover Agent, Vasquez, (who is responsible for the arrest of all three) for a possible \$40,000 sale of heroin in the then near future. Alfredo Medina received an eight (8) year sentence from Judge Palmieri. Thus, petitioner had a reasonable expectation when he pleaded to receiving something less but certainly not more than the sentence imposed upon Medina.

At the time of petitioner's sentencing the record illustrates that the proceedings were temporarily suspended because counsel sought equal sentencing treatment for Aviles. The Court, in the first instance, reflected incredulity concerning Medina's eight (8) year sentence. After verifying counsel's representations to be totally true the Court nevertheless proceeded to arbitrarily sentence Aviles more harshly than Medina (See, Minutes of Petitioner's Sentencing). It is an understatement to say that Aviles was dismayed when he received a more

* Jose' Antonio Aviles was acquitted by a jury.

severe sentence than the similarly circumstanced Medina. The utterly unexpected period of special parole really put the icing upon the proverbial cake for petitioner. Hence, the Court's *argument* that since Aviles received something less than the maximum sentence he should consider himself fortunate is a *non sequitur* to the realities of this case. Petitioner was bereft of legal remedy at the time he was sentenced and counsel so advised him. At the first opportunity to seek redress petitioner has exercised his options.

In essence, the course that the Court below followed in denying the petition was to turn its back upon the law of this Circuit and to rely on cases of other Circuits, such as, *Bachner v. United States*, 517 F.2d 589 (7th Cir. 1975); *Bell v. United States*, — F.2d — (No. 74-2280, August 11, 1975) which deal in part with the no-parole, no probation provisions of a drug statute not related to the case at bar.

Under the law of this Circuit it is respectfully submitted that petitioner Aviles should be permitted to withdraw his heretofore plea and to replead to the indictment.

POINT II

This case, in the event of a remand, should be referred to another judge.

It is quite unfortunate, but, it is an inescapable fact, that in addition to pursuing an untenable legal argument to deny the petitioner relief in this case the Court below has undertaken a personal attack upon petitioner (See, Conclusion of Opinion, 18a-19a).

The Court below remarkably states: "It is unlikely that this defendant can now be successfully prosecuted". An observation totally unfounded on the record. The

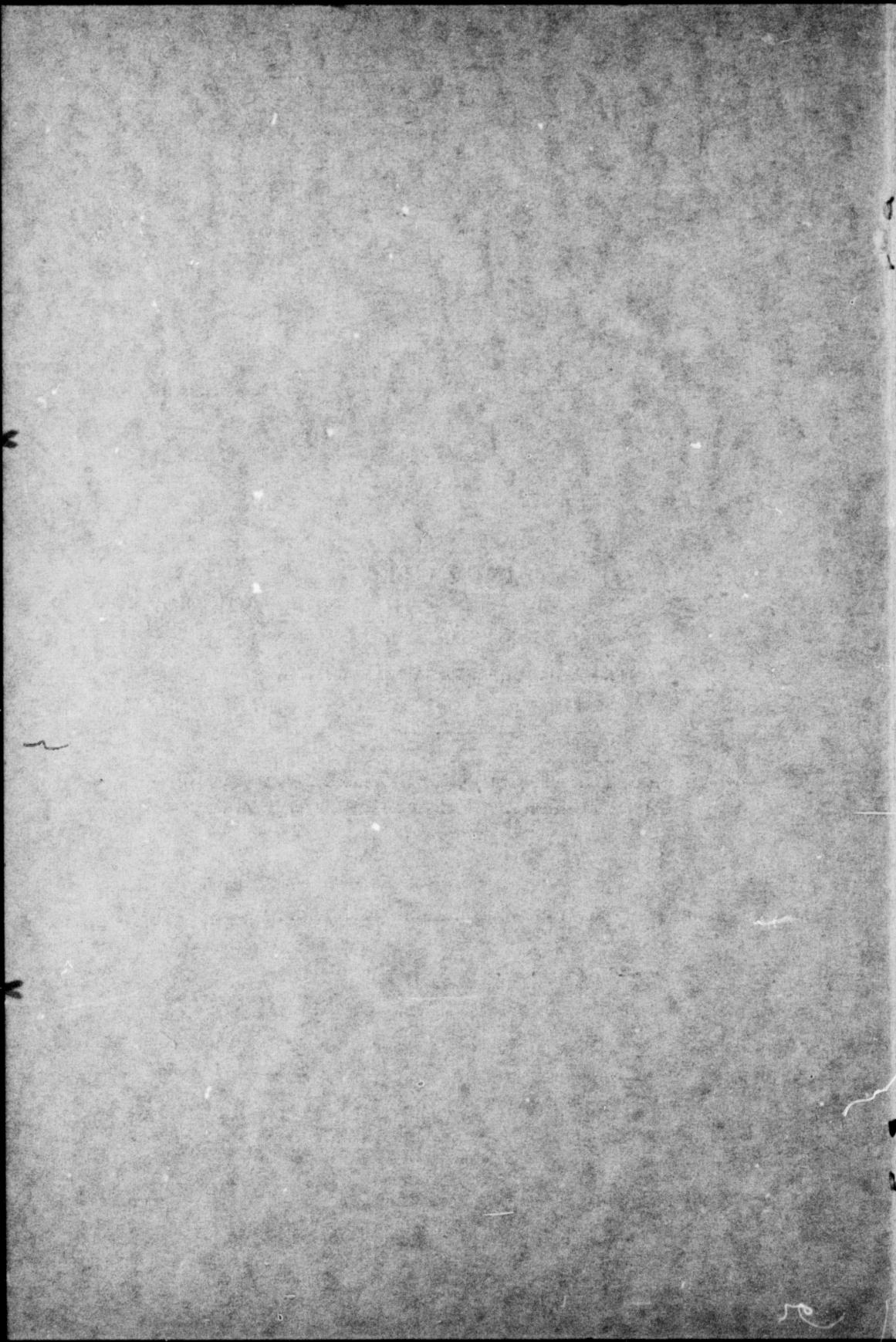
Government has never claimed, as Judge Palmieri suggests that the passage of time (approximately three (3) years) "has eroded and scattered the evidence against him" (18a). The case against Jaime Aviles three years ago and as it is today is based on the believability of an undercover New York Police Officer named Vasquez who was assigned to the Joint Crime Task Force. The Court below's view, particularly in the conclusion of the Court's opinion, depicts militant advocacy, more militant than even the Government in connection with this petitioner.

CONCLUSION

The order appealed from should be reversed and all further proceedings in this case referred to another judge.

Respectfully submitted,

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